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District Court

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AUG 25 2005

For The Northern Mariana Islands
By _____
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Attorney for Defendant

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE**
8 **NORTHERN MARIANA ISLANDS**

9 UNITED STATES OF AMERICA) CRIMINAL ACTION NO. 04-0009
10 Plaintiff)
11 v.) REPLY MEMORANDUM
12) SUPPORTING MOTION FOR
13) JUDGMENT OF ACQUITTAL
14) AND NEW TRIAL
15)
16)
17 PEDRO Q. BABAUTA)
18) Date: September 1, 2005
19)
20)
21) Time: 9:30 a.m.
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I. COUNT FIVE CHARGED CONCEALMENT

The false statement statute, 18 U.S.C. §1001 proscribes two different types of conduct (1) concealment of material facts and (2)false representations. *United States v. Curran*, 20 F.3d, 560, 566 (3rd Cir. 1994). The Ninth Circuit has recognized that concealment and false representation are “two distinct offenses” with each requiring different elements of proof. *United States v. Mayberry*, 913 F.2d 719, 722 n. 7 (9th Cir. 1990). See *United States v. UCO Oil Co.*, 546 F.2d 833, 835 n. 2

(9th Cir.1976), cert. denied, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977).

False representation requires proof of actual falsity, whereas concealment must be established through evidence of willful nondisclosure by means of a "trick, scheme, or device." *Curran*, 20 F.3d at 566. As established in Babauta's moving memorandum, the Ninth Circuit in *United States v. Murphy*, 809 F.2d 1427 (9th Cir.1987) held that an essential element of a § 1001 violation premised on concealment requires proof that the defendant had a legal duty to disclose the facts allegedly concealed. In fact, the majority of the other Circuits have ruled that a § 1001 violation predicated on concealment requires that the defendant must have had a legal duty to disclose the facts at the time of the alleged concealment.

Curran, 20 F.3d at 566; *United States v. Crop Growers Corporation*. 954 F.Supp. 335, 344 (D.D.C., 1997); *United States v. Zalman*, 870 F.2d 1047, 1055 (6th Cir.1989), cert. denied sub nom., *Sharifinassab v. United States*, 492 U.S. 921, 109 S.Ct. 3248, 106 L.Ed.2d 594 (1989); *United States v. Nersesian*, 824 F.2d. 1294, 1312 (2d Cir.1987), cert. denied, 484 U.S. 958, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir.1986); *United States v. Larson*, 796 F.2d 244, 246 (8th Cir.1986); *United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir.1985); *United States v. Irwin*, 654 F.2d. 671, 678-79 (10th Cir.1981), cert. denied, 455 U.S. 1016, 102 S.Ct. 1709, 72

L.Ed.2d 133 (1982). Thus, the prosecution's insinuation that the false representation and concealment theories of § 1001 do not constitute separate distinct offenses, Opposition Memo at 3, is contrary to Ninth Circuit precedent.
See *Mayberry*, 913 F.2d at 722 n. 7.

The substantive charges against Babauta are set forth in counts 2 through 5 of the superseding indictment. Counts 2 through 5 are based on paragraphs 13 and 14 of the superseding indictment. Paragraph 13 incorporates paragraphs 1 through 12 of the superseding indictment. To this extent, paragraphs 11 and 12 both contain allegations of concealment. More specifically, the factual basis for count five is based on concealment and not the submission of a false statement.

Count Five concerns the March 6, 2003 submission of the February, 2003 report. The factual allegations supporting count five are set forth in paragraph 12(f) of the superseding indictment. Paragraph 12(f) alleges as follows:

[o]n or about March 6, 2003 PEDRO Q. BABAUTA, a./k./a. "Pete", the defendant, caused CUC to submit a monthly report to DEQ that **omitted an entire series of samples** taken on February 27, 2003, that showed "positive results" for total coliform bacteria.(emphasis added).

A plain reading of the acts relied upon for Count Five concern concealment. The evidence submitted at trial with respect to Count Five consisted of the omission of the February 27, 2003 testing data. Babauta requested an instruction concerning

concealment. The prosecution contended that concealment was not at issue in the case and the concealment instruction was unnecessary. The court agreed with the prosecution and declined to give the concealment instruction.

In opposing Babauta's post trial motion, the prosecution contends that the jury could have returned a guilty verdict based on the alleged evidence that the test results from February 13, 27, and 28, were falsified¹. Opposition Memo at 3. The prosecution also argues that the jury could have found that the February 28, 2003 test results should have been listed as repeat tests instead of original test results.

Id. The prosecution's contention at trial and in opposition to Babauta's post trial motion entitles Babauta to an acquittal as the contentions amount to a concession that a material variance exists between the indictment and the proof at trial. *See United States v. Tsinghnahijinnie*, 112 F.3d 988 (9th Cir. 1997). *Tsinghnahijinnie* noted that:

[a] defendant is entitled to know what he is accused of doing in violation of the criminal law, so that he can prepare his defense, and be protected against another prosecution for the same offense. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that

This argument misses the mark as Section 1001 prohibits two types of false statements (1) false representations and (2) concealment of a material fact. Thus, the assertion that the jury could have found the statement false does not address the issue of whether that finding is based on concealment or false representation.

1 allegations and proof must correspond is based upon the obvious
2 requirements (1) that the accused shall be definitely informed as to
3 the charges against him, so that he may be enabled to present his
4 defense and not be taken by surprise by the evidence offered at the
trial; and (2) that he may be protected against another prosecution
for the same offense.

5 *Id* at 991. With respect to Count Five, paragraph 12(f) of the superseding
6 indictment clearly accuses Babauta of violating § 1001 with respect to the
7 February, 2003 report by concealing an entire series of tests taken on February 27,
8 2003. This establishes that the grand jury's return on count five was premised on
9 concealment and not false representation. Concealment , not false representation,
10 is the notice given to Babauta for Count five and that was the allegation upon
11 which he prepared his defense. The prosecution claiming the conviction on count
12 five is proper because the jury could have found false representation, is an
13 admission of a material variance which warrants acquittal. *See Tsinhnahijinnie,*
14 *supra.*

15 Alternatively, Babauta should be granted a new trial as the jury was not
16 instructed on an essential element of concealment, which is whether Babauta had
17 a legal duty to report the information not disclosed to the DEQ. This failure
18 greatly prejudiced Babauta as an issue existed regarding whether Babauta had a
19 duty to report the February 27, 2003 test results in absence of the written
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monitoring plan required by DEQ regulations. If the jury had received the proposed
instruction based on *Murphy*, it very well could have returned a not guilty verdict
on that charge given the uncontested evidence that a written monitoring plan
did not exist.

The prosecution's reliance on *United States v. Milton*, 602 F.2d 231 (9th Cir.
1979) is misguided as that case concerned a jury instruction on intent to defraud in
a false representation case. It did not involve the issue of concealment as does this
case. In any event, *Murphy* was decided after *Milton*.

II. **BABAUTA SHOULD BE GRANTED A NEW TRIAL ON COUNTS 4 AND 5 FOR THE PARTIAL CLOSURE OF THE COURTROOM**

Citing the unpublished case of *United States v. Campbell*, 985 F.2d 575 (9th
Cir. 1993), the prosecution contends the exclusion of Babauta's cousin and Mr.
Guerrero from the courtroom did not cause a partial closure. Opposition Memo at
6 - 7. Campbell does not assist the prosecution as it is an unpublished decision and
pursuant to Circuit 36-3 it can not be cited, used or relied upon in this case. *In Re
Burns*, 974 F.2d 1064, 1067-1068 (9th Cir. 1992) *Shaw v. State of Oregon. Public
Employees' Retirement Bd*, 887 F.2d 947, 949 (9th Cir. 1989); *People of Territory
of Guam v. Yang*, 850 F.2d 507, 511 (9th Cir. 1988). Additionally, in *Campbell*

1 the exclusion was pursuant to an order announced in advance and there was not
2 any objection to the order after its announcement. In this case, there was not an
3 order issued by the court giving any instructions about excluding persons from the
4 courtroom during voir dire. Even more so, there was not notice of any kind given
5 in advance notifying the defense or the public that persons could be excluded from
6 the courtroom during voir dire.

7 In *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003) the closure
8 involved an administrative problem. That is not the circumstance in this case. Jury
9 voir dire is not an administrative problem, instead it is an integral part of the trial
10 process. Moreover, none of the cases relied upon by the prosecution involve the
11 exclusion of a family member. Noticeably, the prosecution does not address the
12 issue of the exclusion of a family member. This omission is crucial as exclusion of
13 a family member from the courtroom is the factor which differentiates this case
14 from *Peterson v. Williams*, 85 F.2d 39 (2nd Cir. 1996), on which the prosecution
15 places much emphasis.

16 *Peterson* is a habeas corpus case arising out of the New York state court
17 system. In *Peterson*:

18 [t]he defendant brought a direct appeal in the New York courts.
19 The Appellate Division rejected his appeal, holding that the
20 defendant's rights were not violated. *People v. Peterson*, 186

A.D.2d 231, 587 N.Y.S.2d 770 (2d Dep't 1992). **The court found that only "spectators, rather than members of [petitioner's] family" had been removed from the courtroom**, that the unauthorized closure had lasted fifteen to twenty minutes, and that the courtroom was immediately reopened when the mistake was discovered. 186 A.D.2d at 231, 587 N.Y.S.2d at 771. It "conclude[d] that it is not necessary, in order to advance the[] purposes [served by a public trial], to require a reversal where the closure was completely inadvertent, and no evidence was offered that any observer wishing to enter was excluded." 186 A.D.2d at 232, 587 N.Y.S.2d at 772.

85 F.3d at 42 (emphasis added). A crucial factor underlying *Peterson* was that the exclusion did not involve the defendant family members. This case involves exclusion of a family member. Even more telling is that *Peterson* is a 2nd Circuit case and the 2nd Circuit recognizes that , in connection with any courtroom closure, a special concern exists with respect to excluding a defendant's family members from court proceedings. *See Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir.1994)[“[T]he Supreme Court has specifically noted a special concern for assuring the attendance of family members of the accused.”]; *Carson v. Fischer*, --- F.3d ----, 2005 WL 2009549 at 7 (2nd Cir. Aug. 23, 2005)[“The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly.”] Thus, *Peterson* and the other cases relied upon by the prosecution are not on point as they do not concern the crucial factor of exclusion of a family member.

CONCLUSION

The court should acquit Babauta on count five and grant a new trial on count four. Alternatively, Babauta should be granted a new trial on counts four and five.

Dated this 25th day of August, 2005.

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